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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.
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09/497,620 02/03/00 OTT

D 15006.0007U2

EXAMINER

QM12/1001

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ART UNIT

PAPER NUMBER

3763

DATE MAILED:

10/01/01

Please find below and/or attached an Office communication concerning this application or proceeding.

Commissioner of Patents and Trademarks

Office Action Summary

Application No.

09/497,620

Applicant(s)

Ott et al.

Examiner

Michael M. Thompson

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 32-44 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 32-44 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on ____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. ____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s). ____. |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449) Paper No(s) ____. | 6) <input type="checkbox"/> Other: _____ |

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DETAILED ACTION

Specification

1. The disclosure is objected to because of the following informalities: On page 5, line 14 the applicant states, "As used in the claims, 'A' can mean one or more." The use of "A" denotes singularity. It is understood that the applicant is his or her own lexicographer when defining the metes and bounds of the claimed invention. However, while a term used in the claims may be given special meaning in the description of the invention, generally no term may be given a meaning repugnant to the usual meaning of the term. *In re Hill*, 161 F.2d 367,73 USPQ 482 (CCPA 1947)

Appropriate correction is required.

Claim Rejections - 35 USC § 102

2. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

3. Claims 32-34, 39-41, 43, and 44 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Ott et al. (U.S. 5,411,474). Ott et al. teaches a method of providing for a period of time, heated and humidified gas into a patient by directing a gas from a source to a chamber, humidifying the gas within the chamber with liquid, sensing the humidity of the gas as it exits the chamber and monitoring the humidity of the gas exiting the chamber, replenishing the liquid, determining relative humidity, heating the gas, filtering the gas, sensing the temperature, controlling the electrical power, wherein the step of

heating and humidifying performed on the gas is simultaneous, with the chamber adjacent to the patient.

4. In the alternative, in the event that Applicant disagrees that Ott et al. teaches sensing of the humidity, the Examiner would argue that Ott et al. ('474) in the least indirectly teaches sensing the humidity of a gas. Ott et al teaches several other sensing devices for pressure, temperature and volumetric flow which closely parallel sensing humidity since volumetric flow to and from the chamber in combination with the pressure and temperature will inherently control the humidity as controlled in Ott et al. by keeping the temperature within 2 degrees Celsius. Therefore, it would have been obvious to one of ordinary skill in the art, at the time the invention was made, that the sensing devices for pressure, temperature, and volumetric flow in combination with a teaching that maintains a temperature within 2 degrees Celsius is obviously if not inherently and indirectly teaching the sensing and controlling for humidity.

Claim Rejections - 35 USC § 103

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. Claims 32-34, 38, and 39-44 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ott et al in view of Nishino et al. Ott et al teaches all of the limitations of the claims except for a humidity sensing. Nishino et al teaches a humidity sensing element of electric capacitance

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type, which element is high in accuracy and sensitivity and quick in response. It would have been obvious to one of ordinary skill in the art, at the time of invention, to combine the humidity sensing device of Nishino et al with the apparatus of Ott et al to merely add another sensing device specifically to sense the level of humidity of the gas. Please note that Ott et al teaches several other sensing devices for pressure, temperature and volumetric flow which closely parallel sensing humidity since volumetric flow to and from the chamber in combination with the pressure and temperature will inherently control the humidity as controlled in Ott et al. by keeping the temperature within 2 degrees Celsius. Furthermore, it would have been an obvious matter of design choice as disclosed by Ott et al to dispose the humidity sensing means in the chamber downstream of the heating means. Ott et al teaches placing of the heat sensing means downstream of the heating means, therefore placing the humidity sensing means downstream of the heating means would be an obvious design choice in obtaining more accurate information of the gas exiting the chamber.

7. Claims 35-36 and 38 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ott et al in view of Absten. Ott et al. teaches all of the limitations of the claims except for an alarm. Absten teaches an alarm mechanism controlled by a microprocessor that, "may take the form of an internal 'alarm' in which pressure (for example) would be measured but not displayed for the operator unless problems are detected." (column 5, line 29-32) It would have been obvious to one of ordinary skill in the art, at the time of invention, to combine the apparatus of Ott et al with the microprocessor of Absten to monitor the level of humidity of the gas for the purpose of indicating when the gas drops below a preset, critical relative humidity threshold. It also would

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have been obvious to combine an alarm mechanism as taught by Absten to the modified apparatus of Ott et al to notify the user of any "problems that are detected."

Double Patenting

8. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

9. Claims 32, 39, 41, 43, and 44 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 11-15 of U.S. Patent No. 5,411,474. Although the conflicting claims are not identical, they are not patentably distinct from each other because the claims of the above mentioned patent teaches a method of providing for a period of time, heated and humidified gas into a patient by directing a gas from a source to a chamber, humidifying the gas within the chamber with liquid, sensing the humidity of the gas as it exits the chamber and monitoring the humidity of the gas exiting the chamber, replenishing the liquid, determining relative humidity, heating the gas, filtering the gas, sensing the temperature, controlling the electrical power, wherein the step of heating and humidifying performed on the gas is simultaneous, with the chamber adjacent to the patient.

Contacts

Any inquiry concerning this communication or earlier communications from the Examiner should be directed to Michael Thompson whose telephone number is (703) 305-1619. The Examiner can normally be reached on Monday through Friday from 9 am to 5 PM.


If attempts to reach the Examiner by telephone are unsuccessful, the Examiner's Primary, AnhTuan Nguyen, can be reached on (703) 308-2154. The fax phone number for the organization where this application or proceeding is assigned is (703) 306-4520.

Michael M. Thompson

Patent Examiner

MT 

September 28, 2001


ANH TUAN T. NGUYEN
PRIMARY EXAMINER